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Brief of Wheeler for Petitioners

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United States Supreme Court,

OCTOBER TERM, 1898.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN,
Petitioners and Appellees,

vs.

WILLIAM BURRILL ET AL.,
Respondents and Appellants.

BRIEF FOR PETITIONERS ON PETITION FOR CERTIORARI.

EVERETT P. WHEELER,
Advocate for Petitioners.

Supreme Court of the United States,

OCTOBER TERM, 1898.

GEORGE W. CROSSMAN and HERMAN SIELCKEN,
Petitioners,
(Respondents in Court below)

vs.

WILLIAM BURRILL and others, owners of the bark KATE BURRILL,
Respondents:
(Libellants in Court below.)

BRIEF FOR PETITIONERS.

Statement.

This is a motion for a writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, to review a decree rendered by that Court in favor of the libellants, which reversed a decree of the District Court of the United States for the Southern District of New York, dismissing the libel with costs.

The libel was *in personam*, filed to recover from Crossman & Brother, the present petitioners, fifty-three-days demurrage, for delay in discharging and

receiving cargo at Rio Janeiro; under a charter party of the *Kate Burrill*, entered into between the libellants and Crossman & Brother March 7, 1893. The respondents answered in the District Court, and some testimony was taken (District Court Record, pp. 19–41).*

To portions of the answer the libellants filed exceptions. These were overruled by the District Court, and upon the whole record as thus presented a decree was entered dismissing the libel January 16, 1895. From this decree an appeal was taken to the Circuit Court of the United States for the Second Circuit. That Court gave the libellants leave to amend their libel. Crossman & Brother filed an amended answer. The libellants excepted to the 14th, 15th and 16th articles of this answer on the ground as to each that the same "is insufficient in law to constitute a defense." The exceptions to the 14th and 15th articles were sustained. The exception to the 16th article was overruled. (New Proofs on Appeal, p. 94.)

Testimony was taken in the Circuit Court of Appeals upon the remaining issues (*Ibid*, pp. 81–88). A decree was rendered in favor of the libellants for the amount demanded in the libel, without interest, but with costs. The defences set up by the articles of the answer thus excepted to, are these:

1. That under the provisions of the charter party the liability of the charterer for demurrage ceased upon the execution and delivery of bills of lading to the consignees' agents (Fourteenth Article).

2. That the delay at Rio Janeiro in unloading the vessel was caused by a state of war prevailing there between the insurgents and the Government

*References are all to the original paging.

of Brazil, which made it impossible for the vessel to discharge and for the consignees to receive the cargo within the lay days (Fifteenth Article).

3. That the agents of the libellants accepted a certain sum at Rio Janeiro in satisfaction for all claims under the charter party (Sixteenth Article).

The Circuit Court of Appeals and the District Court agreed in holding that the cesser clause set up in the 14th article of the answer did not apply, because the bill of lading did not give to the shipowner a lien for demurrage. The District Court held that the defence of *vis major* set up under the 15th article of the answer was a sufficient defence. On this point the Circuit Court of Appeals disagreed with the District Court. These two questions are of great importance to the commercial world.

Both Courts held that the defence of accord and satisfaction was sufficient in law. The Circuit Court of Appeals held that it was not sufficiently proved.

The case is reported in the District Court, 65 Fed. Rep., 104.

In the Circuit Court of Appeals, 69 Fed. Rep., 747, 16 C. C. A.. 381.

In this brief it will be more convenient to consider first the validity of the defence of *vis major*. This is the point on which the learned Courts below differed.

The charter party is printed at pages 7–10 of the District Court record, and at pages ~~19–21~~ of the new proofs on appeal. The bill of lading is at pages 15, 16, of the former. 79–81

The contract for the sale of the lumber by W. H. Crossman & Brother, the charterers, to the Companhia Industrial do Brazil was made by cable in

December, 1892. The price was $28 per thousand feet, including cost, freight and commissions (Record District Court, p. 21, fol. 63, pp. 31, 32). The freight was deducted from the invoice (*Ibid.* p. 41) and was paid in Rio by the Companhia to Phipps Bros. & Co., the agents of libellants. (New proofs on Appeal, pp. 14, 15). The bill of lading was dated May 5, 1893. The amount of the invoice was paid by a draft, drawn by the charterers upon a London bank against a letter of credit, issued to the charterers, for account of the Companhia (Record, District Court, pp. 22, 23).

In due course this draft must have been taken up by the Companhia. We hear nothing more of it.

"The cargo was sold by the consignees to the sawmill belonging to Mr. Berrogam" (New proofs on Appeal, p. 95, fol. 96).

It had been from the first distinctly understood that the shipment was at the request and on account of the Companhia. It cabled to the charterers December 12, 1892: "Ship in accordance with our cablegram of December seventh" (District Court Record, p. 32, fol. 95).

POINTS.

First.

Defence of Vis Major.

The 15th article of the amended answer alleges:

Fifteenth.—And further answering respondents

allege upon information and belief that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel, any sooner than it was discharged or received. That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy, and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers and Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor.

The Circuit Court of Appeals held that this defense was insufficient in law, on the ground that the charter party contained an absolute agreement to discharge the cargo in question, within a certain time, at all events. The clauses claimed to contain this agreement are:

"Cargo * * * to be discharged at port of destination at the average rate of not less than (20 M) twenty thousand superficial feet per running day, Sundays excepted.

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention by default of the said party of the second

part, or agent ($59 46/100) fifty-nine 46/100 dollars U. S. gold, or its equivalent, per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent."

The radical error in the opinion of the Circuit Court of Appeals is in their failure to consider:

(1.) That the clause as to discharging is an agreement both by the shipowner and by the consignees. The ship must discharge. The consignee must receive.

(2.) That the only provision in reference to the liability for delay in the reception of the cargo is that already quoted; which charges the charterers, not absolutely, but only in case of their *default* or that of their agent.

The exception to the Fifteenth Article was therefore not well taken. It should have been overruled. The respondents were entitled to judgment upon it, in their favor.

I.—These allegations established a case of mutual inability on the part of both vessel and consignee. No precise number of lay days is fixed by the charter. "The lay days are to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part or agent" (District Court Record, p. 9, fol. 25). If it was impossible to discharge cargo, the vessel could not be said to be ready to discharge it. It was equally impossible for the consignees to receive it. Under such circumstances there is no liability for damages against either

party. "Delivering cargo is as much the duty of the ship owner, as of the merchant."

Ford *vs.* Cotesworth, L. R., 4 Qu. B., 127; Affd. on Appeal, 5 *Ibid.*, 544.
Cunningham *vs.* Dunn, 3 Com. Pleas Div., 443.

In Ford *vs.* Cotesworth the Court of Appeals say (L. R., 5 Q. B., 547).

"The defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship, and the plaintiffs were as much prevented from doing their part as the defendants."

And BLACKBURN, J., said in the Queen's Bench (p. 133):

"Delivery of the cargo is as much the duty of the ship-owner as of the merchant."

To the same effect are

Dahl *vs.* Nelson, 6 App. Ca., 38.
Carsanego *vs.* Wheeler, 16 Fed. Rep., 248, 253.
The *Spartan*, 25 Fed. Rep., 44, 51.

II.—There is no liability for demurrage where the vessel is prevented from receiving cargo by the authorities at the port at which the cargo is to be taken on board. Under such circumstances the ship is excused.

White *vs.* Steamship Winchester Co., 23 Scottish L. R., 342.

The reasoning of this case is equally applicable to a failure on the part of the ship to discharge

the cargo. Many of the authorities referred to by the advocate for libellants are considered, and it is held that they have no application to a case where the inability to handle the cargo is caused by *vis major*.

Vis major is a valid defense in all actions upon contract unless it appear that there was an absolute agreement to perform at all events. This Court held it a defense in an action for rent.

Gates *vs.* Goodloe, 101 U. S., 612.

III.—Apart from the question already argued, it is clear upon the allegations of the answer that there was no default on the part of the charterer or his agent. Wherever the delivery of goods is prevented by a superior force which the contractor cannot control or prevent he is excused.

Geismer *vs.* Lake Shore & Michigan Southern R., 102 N. Y., 563, 571.

At page 571 the Court say:

"Here, upon the facts, which we must assume to be true, there was no *default* on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty, but they were prevented by mob violence, which the defendant could not by reasonable effort overcome."

IV.—But libellant insists that the word "*default*" means omission, and that defendants are liable, at all events, for an omission to receive the cargo, whatever the cause.

Default is defined in the Century Dictionary to be:

1. "A failing or failure; an omission of that which ought to be done; neglect to do what duty, obligation or law requires.

* * * * * *

3. A fault, an offense, a misdeed, a wrong act."

Abbott Law Dict., Vol. I., p. 356, defines it:

"The neglect or omission of a duty, or failure to perform an obligation."

It is thus defined by Lord Justice Bowen *in re* Young & Harston's Contract, 31 Ch. Div., 168, 174:

"Default is a purely relative term, just like negligence. It means nothing more, nothing less than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

And at page 173, Sir J. HANNEN says:

"Our judgment, therefore, is that where a man knowing that some act has to be done by him on a particular day, goes away, in disregard of that obligation, he is guilty of default."

Plainly the Court would have held that if he had been prevented by revolutionary violence, he would not have been guilty of default.

In Caffarini *vs.* Walker, 9 Irish Rep., Common Law, 431, 437, "default" it thus defined by FITZGERALD, J.

"'Default' would seem to embrace every failure by the defendant to perform this contract, *unless prevented by superior force, over which the defendant had no control*, such as stress of weather."

If libellant could show an express agreement in the charter that the consignee would take the cargo away at all hazards, his omission to do so might perhaps be called a "default." But in this case it was as much the duty of the owner to discharge the

cargo as it was of the consignee to receive it. The sailors would fear the shot and shell of the ironclads as much as the longshoremen. A mutual inability cannot be called the "*default*" of the charterer or his agent.

Libellants' argument really gives no effect to the word "default of the said party of the second part or agent." They construe the charter party as if these words were omitted. But they were not omitted. The Court will therefore give them effect, *and if the allegations of the answer are true it is manifest that the "detention" was by act of the public enemy, and not by "default" of the charterers or their agent.*

V.—All contracts should have a reasonable construction. It has been shown that the word "default" may mean either mere omission or a positive fault. The latter is its natural and obvious meaning. Who can doubt that the parties used it in the latter sense. What reason would there for an absolute contract by respondents to become liable at all events for a failure to discharge cargo in a remote port, over which they had no control. Libellants' captain was on the spot. It was he who could urge and expedite the discharge. What reason can be assigned for the contention that libellants supposed they had an absolute undertaking from the charterers to be liable at all events for delay at Rio.

In Bailey *vs.* De Crespigny, L. R. 4, Q. B., 180, the Court say (p. 185):

"Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to

include, were not used with reference to the possibility of the particular contingency which afterwards happens.

The word impossible in such cases is not used in a strict mathematical sense, but with reference to the course of business and its practical conduct.

In Dahl *vs.* Nelson, 6 App. Ca., 38, the Court says (p. 53):

"In matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost."

To the same effect is Price *vs.* Hartshorn, 44 N. Y., 94.

In this case it was held that in order to warrant such construction of a carrier's agreement as to increase his common law liability, and make it an absolute agreement to deliver at all events, the contract "ought to be clear and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both parties" (p. 99).

The Court further held that such an agreement would not be implied from a contract to deliver cargo "in like good order as it was received by correct measure or weight in the customary way without delay," but that under such a contract the carrier was not liable for a loss occasioned by the "act of God."

This limits Harmony *vs.* Bingham, on which libellants rely.

VI.—The case most relied as by the Court below is:

Sixteen hundred tons of nitrate of soda (15 U. S., App. 369; S. C. 10 C. C. A. 115; 61 Fed., 849).

There the language of the charter party was essentially different. That provides: The *Charterers* "shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid lay days as follows: Thirty working lay days for loading to commence 24 hours after her inward cargo or unnecessary ballast is finally discharged. * * * And for each and every days detention by default of" the charterers, they should pay demurrage.

The charterers were to load. The demurrage claimed was for failure to load. This was directly caused by their inability to get delivery of nitrate which they had bought. The remote cause was the revolution.

Here then was an express agreement limiting the time for loading, and a failure to load within that time by the party whose duty it was to load. Moreover there was no violence preventing loading. At page 376 (15 U. S. App.) The Court say:

"When the master of the vessel demanded the cargo, the charterers had none. Their cargo had been contracted for, but had not been delivered to them. They could not obtain possession of it. But there was no interference upon the part of the Chilian Government, or upon the part of any armed force to prevent their obtaining possession of the cargo, or handling or moving the same or placing it within reach of the vessels' tackle."

Even here Judge Ross dissented. But how radically different the two cases. In the case at bar, the agreement fixing time fixes it for discharging, which was the duty of *libellants*.

Moreover, the word "default" might well include the failure of charterers to get a cargo, which they had agreed to furnish. But it does not include the case of prevention by physical force from taking cargo away. In the one case there is no cargo to load. The question of *vis major* does not arise. *Causa proxima, non remota spectatur.* But in the case at bar the proximate cause was the actual firing between the vessels of war and the forts in the harbor. It is an abuse of language to call that *the default of the consignees.*

VII.—The other cases cited by the Circuit Court of Appeals do not support the proposition for which they are cited (new proofs on appeal, pp. 30, 31; 69 Fed. Rep., 751).

In Waugh *vs.* Morris, L. R. 8 Q. B., 202, the charterer sent the ship to a wharf at which discharge was prohibited. There was no objection to discharge in the river into another vessel, which was done. The delay was clearly the charterer's fault. The word "default" was not used.

In Cargo *ex* Argos, L. R. 5 P. C., 134, the clause read (pp. 136, 161):

"The goods to be taken out within twenty-four hours after arrival or pay £10 10S a day demurrage." The word default was not used.

In Davies *vs.* McVeagh, 4 Excheq. Div., 265, the agreement was absolute to pay demurrage if the vessel was detained more than nineteen days. The word "default" was not used.

The same is true of Lees *vs.* Yates, 3 Taunt, 387.

In Postlethwaite *vs.* Freeland, 5 App. Ca., 599, the word "default" did not occur in the Charter party. Lord Blackburn (p. 618) quotes from Ab-

bott on Shipping to the effect that where the charterer has absolutely engaged that the ship shall be discharged in a certain time, he is liable if she is not. This proposition is not disputed. But when the obligation to pay demurrage is made by the charter to depend upon the charterer's *default*, there is not an absolute engagement.

In Grant *vs.* Coverdale, 9 App. Ca., 470 (like the Nitrate case in the Ninth Circuit) the real cause of the delay was that the charterer had no cargo to put on board. It was held no defense that he was prevented by frost from transporting the cargo by canal to the place fixed for loading.

In Budgett *vs.* Binnington, 25 Q.B. Div., 320, the language was (p. 321): "*In no case* should more than seven running days (Sundays excepted), be allowed for unloading." It was held that a strike was no defense, although it prevented the shipowner as well as the consignees from doing his part in the discharge of the ship. The decision was put wholly upon the "*absolute*" language of the charter.

And now to turn to the only case cited, in which a clause existed, similar to the present:

Davis *vs.* Wallace, 3 Cliff, 123; Fed. Ca., 3657, Vol. 7, p. 182.

In this case the consignee ordered the ship to a crowded wharf. The discharge was delayed in consequence. It was held that this was caused by the "default" of the consignee.

In the case at bar no such facts appear. The article excepted to alleges that "libellants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason *of the act of the public enemy*," &c. Indeed, Davis *vs.* Wallace is

favorable to respondents, for it held that the charterers were not liable for a certain portion of the delay, in which the captain acquiesced. In the case at bar the article excepted to alleges (New Proofs on Appeal, p. 78):

"That the captain of the said vessel, and Messrs. Phipps Brothers & Co., the agents of the libellants, acquiesced in said delay, and recognized the necessity therefor."

VIII.—The Court below, in disposing of this part of the case, entirely overlooked one essential element. The agreement is to pay demurrage for "every day's detention by default of the said party of the second part or *agent*." Whatever default existed was on the part of the second vendees of the lumber. The ship was taken alongside their wharf and the lumber discharged there. (New Proofs on Appeal, p. 45, fol. 96.) As the Circuit Court of Appeals say in their final opinion: 105

"As a matter of fact the consignees were not agents for the appellees (petitioners); they were the purchasers of the cargo."

The clause in question must certainly be strictly construed. How then can petitioners be charged for the default of those who confessedly were not their agents.

Second.

Cesser Clause.

Libellant's brief and the opinion of the Court

below devote a great deal of learning to the construction of this clause. The facts are as follows:

The charter party was made in New York, March 7, 1893, between libellants, managing owner of the *Kate Burrill;* and the petitioners, doing business under the name of W. H. Crossman & Brother (District Court Record, page 7, fol. 21). The whole vessel is chartered for a voyage from Pensacola to Rio Janeiro. Before this charter was made and in December, 1892, the cargo of lumber to be carried had been sold by the petitioners to the consignee in Rio (District Court Record, pp. 21, 22. Ex. 3, pp. 39, 40). When the vessel was loaded the lumber was "billed" or invoiced to the consignee, the Compania Industrial do Brazil (p. 22, fol. 66).

The material clause of the charter is as follows (*Ibid*, p. 9, fol. 26):

"The bills of lading to be signed, as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight and demurrage. Charterer's responsibility to cease when the vessel is loaded and bills of lading are signed."

Bills of lading were signed by the captain at Pensacola, May 5, 1893 (*Ibid*, pp. 15, 16). They acknowledge shipment by defendants of lumber to be delivered at Rio "unto order or to their assigns," they paying freight "for the said lumber as per charter party dated 7th March, 1893, and average accustomed."

The words "as per charter party, dated 7th March, 1893," were not in the printed form of the bills of lading, but were stamped upon it in respondent's office (District Court Record, pp. 24, 25, fols. 72, 73; p. 35, fol. 103). The only object of the bills of lading was to enable respondents to attach them to a draft for the purchase price. This was drawn against a letter of credit issued by a bank in London in favor of the Companhia Industrial (*Ibid*, pp. 37, 38; fols. 111, 112). When the draft was paid the bill of lading became unimportant.

The error in the Courts below was in treating the case as if it arose between the charterer and a *bona fide* holder for value of the bill of lading; whereas the question, so far as the existence of the lien for demurrage was concerned, rested between the purchaser of the cargo who bought it before any bill of lading was issued, and the shipowner. It may very well be conceded that the authorities cited in the Court below do hold that "where the provision for cesser of liability is accompanied by a stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers were enabled to create, is not equivalent to the liability of the charterers."

It is obvious from this statement of the rule that the Court had in mind the case of a lien created by a bill of lading, existing against the owner of a portion of the cargo shipped by a particular ship, and his transferee for value and without notice. In such cases the sole contract, so far as the owner of the goods is concerned, is contained in the bill of lading, and the Courts hold that inasmuch as it was the fault of the charterer that this lien is not coextensive with that sought to be created by the charter

party the liability of the charterer for the difference still remains. As for example, in

Klink *vs.* Radford (1891), 1 Qu. B., 625,

the charterers were sued for damages caused by delay at the port of loading. This was the charterers' own fault- It was held that the cesser clause did not relieve them from liability, not only because no lien for damages caused by such delay was provided for in the bill of lading, but also because the amount of the damage was unliquidated.

In Hanson *vs.* Harold (1894) 1 Qu. B., 612, the ship was re-chartered. The difference between the freight called for by the original charter and that called for by the re-charter grew out of the fact that the first was a lump sum, and the second was so much per bushel. The oats forming the cargo shrunk during the voyage to England. It was held that the original charterers were liable for the difference in question, notwithstanding the cesser clause. The original charter gave the privilege of re-chartering the vessel at any rate of freight "without prejudice to this agreement."

These cases were undoubtedly well decided. But other cases of equal authority have held that upon facts similar to those in the case at bar, the lien created by the original charter party would remain. It follows necessarily that upon the test stated by the Court below, the lien given by the charter party was not extinguished by the issue of the bill of lading. It therefore remained when the vessel arrived at Rio Janeiro.

McLean *vs.* Fleming, 2 H. L. Sc. App., 128.

In this case the charter gave a lien on the cargo for all freight, dead freight and demurrage. The bill of lading made no mention of dead freight or demurrage. It was held by the House of Lords, affirming the Court of Session, that as between the owner of the ship and the persons for whom the charter party was effected, the lien remained, and that the issue of the bill of lading when the cargo was shipped did not impair this lien.

S. P. Gledstanes *vs.* Allen, 12 Comm. Bench, 202.

In this case the original charter was for a lump sum and a lien for this sum was given by it. Goods were shipped in Penang at a rate per cwt. which amounted to less than the lump sum. The goods were shipped by the charterers to their agents in London for sale. It was held that these agents were not entitled to the goods until they paid the lump sum, and that it was not sufficient for them to tender the freight called for by the bill of lading. The Court say that it would be otherwise if the bill of lading had been endorsed for value, and the claim had been made by a *bona fide* endorsee.

That this must be the rule is manifest. It is not denied that the respondents had a right in the original charter to impose a lien upon the cargo for demurrage. It is equally plain that they did so. How then has this lien been divested? What is there in the bill of lading which shows an intent on the part of both contracting parties to divest it? The bills of lading were drawn in New York by the petitioners. They were prepared and sent to Pensacola for signature by the Captain. The bill of lading is on one of their printed forms. (District Court Record, Page 25, fol. 73). Can it be supposed for a moment that the charterers, having effected

a charter giving a lien for demurrage, would immediately draw a bill of lading with the intention of relinquishing such lien? If any person were a party to this action who could show that the bill of lading contained the whole contract between the charters and the consignees, the petitioners no doubt would not be allowed to deny that it did. But in the suit between the original parties, or their assigns or vendees, where no new rights of a bona fide holder for value, and without notice, intervene, the charter must control.

The rule of law which allows the charterers to agree with the owners of the ship that there shall be a lien upon the cargo for demurrage, makes them for this purpose the agent of the vendee of the cargo. It was part of the contract that the goods should be shipped to the vendee in South America. The manner of shipment and the terms upon which the shipment was to be effected, were necessarily left to the petitioners, the vendors. No complaint was made of these terms by the vendees. It appears distinctly from the testimony of the Treasurer of the Companhia Industrial do Brazil, Hime, who was examined on commission, and from the letters put in evidence by the libelants, that the terms of the charter party were known to them all and were discussed in Rio Janeiro. At page 96 (new proofs on appeal, fol. 98), Hime says the captain did mention something with regard to demurrage, "and I replied to him that in conformity with his charter party he had to deliver cargo on shore, and as he had contracted to discharge the same (that is going alongside the wharf instead of doing the discharging into lighters) I had nothing to do with it."

So in the letter written by the libellants to their agents in Rio Janeiro, they say (*Ibid.*, page 87, fol. 221): 147

"We note by the charter party that there is no exception clause covering these occurrences, and it is just possible the consignees' cargo are liable."

The conduct of the parties is always cogent evidence of the construction to be given to their contracts.

Insurance Co. *vs.* Dutcher, 95 U. S., 269.

At page 273 the Court say:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

Chicago *vs.* Sheldon, 9 Wallace, 50.
General Mut. Ins. Co. *vs.* Sherwood, 14 How. U. S., 362.
Woolsey *vs.* Funke, 121 N. Y., 87, 92.
Reid *vs.* Sprague, 72 N. Y., 457, 461.
Nicoll *vs.* Sands, 131 N. Y,, 19, 24.

In this case their conduct at Rio shows that no claim was made by anybody that the bill of lading had superseded the charter party so far as the lien was concerned. On the other hand the claim

was made that the violence of the revolution was a sufficient excuse for the delay in the discharge of the cargo.

Hime, the treasurer of the Companhia, the consignee so testifies (New proofs, pp. 47-48):

"All I can say is that I am exceedingly astonished and surprised that such a suit should be brought against the charterers of the vessel, as by the terms of the charter-party, it is conclusive that once the cargo is on board and the bills of lading signed, the charterer's responsibility ceases, the captain having lien on the cargo for freight and any and every other claim."

October 11, 1893, libellants write their agents in Rio, making a claim against the Government of Brazil and suggesting one against the consignees (New proofs on Appeal, p. 87). The agents reply that there is no claim against the Government, and that they have told the captain "that he should look to his consignees to make the claim on the owners of the cargo" (*Ibid.* p. 88).

Third.

Accord and Satisfaction.

It is not disputed that the consignees of the cargo, the Companhia Industrial do Brazil, settled the ship's accounts with her agents, Phipps Brothers & Co., at Rio, and paid the latter the amount shown by the account rendered, which was remitted to libellants and received without objection.

The Circuit Court of Appeals held that this set

tlement was not binding, and could be reopened, because the claim for demurrage was not specically included in the settlement.

This was error.

I.—The claim was certainly presented and discussed at Rio. The facts bearing on the claim were disputed.

Edwin E. Hime was examined on commission. He was a merchant in Rio Janeiro (new Proofs on Appeal, p. 94, fol. 93), and director and treasurer (*thesoureiro*, p. 95, fol. 216) of the Companhia Industrial do Brazil, the consignee of the vessel and cargo (p. ~~45~~, fols. 94, 95). 105

He testifies that the *Kate Burrill* went alongside the wharf of the vendees of the lumber who had the saw mill and that "the said owners of the saw mill had sufficient storage to stow the whole of the cargo as fast as delivered by the vessel" (p. ~~45~~, 105 fol. 96). The captain made no complaint on this score (p. 96, fol. 98), but "did complain that he could not discharge the cargo as fast, or in accordance with the charter party, owing to prohibitory orders on the part of the government, there being a revolution against the government at the time, and firing in this particular locality being exceedingly heavy, and injuring life and property. This complaint was made to me, and I replied to it that I could not help him in the matter, and that he had to obey the government's orders as I had to" (p. 106 ~~46~~, fol. 97). The captain made no mention of "there being no room for storing the cargo, nor that they could not get the lumber clear of the saw mill, or that they were not selling their lumber. As far as I can recollect, there was no other vessel there" (p. ~~46~~, fol. 98).

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Wilson, the captain, and Hime both testify that a question arose about demurrage. The captain testifies in substance as follows:

I made no claim upon the consignees of the cargo for demurrage. I did tell them that I intended to claim demurrage. "They said on account of the revolution I couldn't claim any demurrage." I had nothing to do with the collection of freight. That was collected by Phipps Brothers & Co. (p. 123, fol. 148). I spoke to Phipps Brothers & Co., the agents of the ship, sometimes, as to how the ship was discharging. "I said that the ship ought to get demurrage for detaining her so long in port after her lay days were up." I said that to the manager in Phipps' office. He made no reply (p. 125, fols. 155, 156).

"As soon as our lay days were up I went to the consignees and told them they would have to pay demurrage, and they said we couldn't claim any demurrage on account of the revolution" (p. 126, fol. 157). I furnished no information to Phipps & Co. to enable them to send their account to the assignees of the cargo (p. 126, fol. 159). I knew that our charter party called for demurrage, so much a day, day by day (p. 127, fol. 160). I said to Phipps Brothers, 'The consignees ought to pay the demurrage for detaining the vessel so long.' They said they didn't know" (p. 127, fol. 162).

William Burrill, one of the libellants, and one of the owners of the *Kate Burrill*, was called as a witness. He does not deny that Phipps Brothers & Co. were agents for the ship in Rio Janeiro, or that they collected and remitted to him the freight less the charges. He writes them October 11, 1893, the following very significant letter (p. 147):

"We presume the delay and extra cost of provisions and labor, &c., will be a very serious additional expense for which the Government of Brazil

should be liable, in which case we hope you will claim for us the utmost dollar. We note by the C/Party that there is no exception clause covering these occurrences and it's just possible the consignees' cargo are liable."

The answer to this is dated November 17, 1893, eleven days before the discharge of the cargo was completed (p. 143, fol. 209), and makes the following statement (pp. ~~87, 88~~ 147,148, ~~fols. 222, 223~~) to p. 94

"Since writing on 16th ulto. we are in receipt of your favor of 11th idem.

There is absolutely no claim against the Government that could be made good for loss occasioned by delays, &c., in consequence of the present revolutionary troubles, and every branch of trade is suffering severely without any prospect of redress.

We saw Captain Wilson a day or two ago when he told us he had still about 2,000 pcs. on board and waiting for his consignees to take them away. It is we understand most difficult to get labour and many vessels are lying for weeks unable to discharge for want of men. We fear Capt. Wilson will not be able to collect any demurrage in these times but have told him that he should look to his consignees to make the claim on the owners of the cargo."

Phipps Brothers & Co. notified the Companhia "that they were not to give the captain any money and that the accounts of the vessel had to be liquidated with them (Mess. P. Bro. & Co.) and not with the captain" (p. 65, fol. 95).

It is further proved by Hime that an account was rendered by him to Phipps Brothers & Co. for the amount due under the charter party, and that the amount shown by it to be due was paid and received in full settlement of all claims under the charter party (pp. ~~47, 48~~ 107,108, fols. 100 to 104).

The account rendered by the consignee to Phipps Brothers & Co. is at pages 51 and 52, and is marked Exhibit A. It is a duplicate of the account received from them by the libellant Burrill (pp. 68, 69, fol. 1656), which is marked Libellant's Exhibit 3 (p. 85). He also received an account current from them, showing their collections and remittances on account of the *Kate Burrill* (p. 69, fol. 167, Ex. 4, p. 88).

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II.—It is plain from the testimony already detailed, which is undisputed, that Phipps Brothers & Co. were the general agents in Rio Janeiro for the libellants in all matters relating to the *Kate Burrill*. The rule applicable to such a case is well settled.

1 Am. & Eng. Encyclopædia of Law, 2nd Ed., p. 1022.

"A general agent for the management of the business of the principal has an authority coextensive in scope with the business. He must necessarily possess and exercise the same power and authority that his principal could if present."

This proposition is abundantly sustained by authority.

Watteau *vs.* Fenwick, 1 Q. B. (1893), 346.

Hubbard *vs.* Ten Broeck, 124 Pa., 291.

Cummings *vs.* Sergeant, 9 Metc. (Mass.), 172.

Bergenthal *vs.* Fiebrantz, 48 Wis., 435.

The same rule was applied to contracts made by the cashier of a bank in

Minor *vs.* Mechanics' Bank, 1 Pet., 46

Bridenbecker *vs.* Lovell, 32 Barb., 9.

The question is whether what the agent did was "in the course of his employment;" not whether it was specifically authorized.

New Orleans Co. *vs.* Hanning, 15 Wall., 649.

Baltimore Trust Co. *vs.* Hambleton, 40 Lawy. Rep. Ann., 317, 238.

The position of a general agent is certainly not inferior to that of a master in a foreign port. The rule as to his authority is well stated by Kay, Law of Shippers and Seamen, Sec. 400, p. 283 (2d Ed.):

"He has authority in a foreign port to settle accounts for freight, demurrage and delay and all such matters."

To the same effect is

Alexander *vs.* Dowie, 1 Hurlst. & N., 152.

Baron MARTIN (p. 156):

"WILLES, J., on the trial held that of necessity the captain had authority to settle all such matters (lay-days and demurrage), and that business could not be carried on unless the captain's agreement under such circumstances was binding. I concur with him in thinking that the captain must necessarily have authority to make such settlements, otherwise persons having to make payments abroad would be placed under insuperable difficulties."

But in the case at bar the question is whether an agent charged with the general management of a ship's business, and amongst other things to collect the amount due under the charter party, is author-

ized to liquidate this amount. If such an agent is not authorized to liquidate the amount, it is obvious that the transaction can only be had by the express authority of the principal. As pointed out by Baron Martin such a rule would place persons having to make payments abroad under insuperable difficulties.

III.—One reason for the rule on this subject is the injustice that would be done to parties dealing with the shipper, if there was no one present who could settle controversies relating to her voyage. In the present case the charter party gives the vessel "an absolute lien upon the cargo for all freight, dead freight, and demurrage" (p. 9, fol. 26).

The Circuit Court of Appeals has held that the bill of lading is not as extensive as the charter; that under its terms there would be a lien only for demurrage caused by the neglect of the consignee (p. 89, fol. 47), and that under the charter, *vis major* at Rio Janeiro was no defense to the claim for demurrage (p. 92). The learned District Judge held otherwise. Certainly a question upon which learned Judges have differed was debatable, and therefore a fair one for settlement. Moreover, according to the captain's testimony, the failure to discharge the cargo in time was caused by the neglect of the vendee of the lumber to whom the consignee directed him to make delivery (p. ~~58, fol.~~ 119 137). He says as to the negligence of the consignee's agent, "There wasn't enough water to get into the dock" (p. 119, fol. 138). I made objection to the slowness of the discharge of the cargo to the consignees. "They told me as soon as that other vessel got out, they would take the cargo out as fast as we could discharge her." I was ready and

able to discharge the cargo faster than the consignees received it. "They hadn't warehouse room to put the cargo away from the ship." The wharf "was pretty well piled up with lumber by the saw mill." I complained again to the consignees respecting the suspension of the discharge of the cargo. "They said there was no room to put the lumber away on account of the trouble. They couldn't gett he lumber clear of the saw mill. They were not selling their lumber. When the other vessel was there the place was filled up. There was no place to put it" (p. ~~61~~) 121

If this testimony is true, it is plain that the captain could have enforced his lien upon the cargo for demurrage. If such lien had been enforced, there seems no reasons to doubt that it wonld have compelled a settlement. In any case no attempt was made to enforce the lien for demurrage. Instead of this, the ship' s agents presented an account which was paid in full, and the ship went away.

There was laches on the part of the captain and ship's agents in the failure, under the circumstances, to claim and enforce a lien, and they ought not now to be allowed to enforce the present demand against innocent consignors.

Leather Manufacturers' Bank *vs.* Morgan, 117 U. S., 96.

In the case at bar if the libellants or their agents had acted promptly, as above shown, it is altogether probable that the respondents would have had some remedy against the consignees, which is now lost.

Penn Mutual Co. *vs.* Austin, 168 U. S., 685, 698.

IV.—The libellants accepted the remittance from Phipps Brothers & Co. without objection, and so far as appears, have never repudiated it in any way. When this payment was received by the libellants they received a copy of the statement rendered by the consignees (p. 62). The correspondence at pages 87 and 88 shows that libellants then had full information as to the facts. Under these circumstances their receiving the remittance without objection was a ratification of whatever their agents had done.

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147, 148

Palmerton *vs.* Huxford, 4 Denio, 166.

V.—The amount due in Rio Janeiro under the Charter Party, was unliquidated. It was uncertain whether there was a valid claim for demurrage, and if any, for how many days it was payable. It was uncertain as to what charges could properly be deducted from this amount. The claims on both sides are therefore unliquidated.

Nassoiy *vs.* Tomlinson, 148 N. Y. 326.

Where this is the case, the acceptance of a smaller amount than that actually due in satisfaction of the whole amount due, is a good accord and satisfaction.

Bofinger *vs.* Tuyes, 120 U. S., 198.
United States *vs.* Child, 12 Wall, 232.
Fuller *vs.* Kemp, 138 N. Y., 231.

In this case the party receiving the check kept it, but wrote that he accepted it as part payment only. The maker thereupon notified him that ihe check was sent as payment in full. It was held that under these circumstances the protest was un-

availing to the payee, and that his using the check amounted to an accord and satisfaction.

To the same effect is Davenport *vs.* Wheeler, 7 Cowen, 231.

In this case, the Court say :

" Having violated the contract (suppose on both sides) the matter rested in compromise. * * * The debt was unliquidated in its nature, but by the acts of the parties it was liquidated and paid. They ought not afterwards to be allowed to go into evidence upon it.

Fourth.

Account Stated.

When the business in Rio Janeiro was concluded an account was rendered to Phipps Brothers & Co. for the amount due the ship. This account was accepted by them and no objection appears to have been taken to it before the filing of the libel. The libel itself does not contain any allegations apt to satisfy the Court that this account stated should be opened. There is no allegation of fraud or mistake. Under these circumstances the account stated should not be opened. Not being opened it is a final settlement of all matters in difference under the charter party.

There is some confusion in the cases owing to the failure to discriminate between an account stated, as evidence of a balance to recover which suit is brought, and an account stated as a defense to a

suit. It is often said in reference to the first class of cases that the account can be opened for fraud or mistake. But no authority has been found in which where an account has been stated, and a balance appearing to be due has been paid in full, the party receiving the payment has been allowed to open the settlement thus effected, upon proof that an item which ought to have been included in the account was not included in it, or that upon a proper construction of the contract he was entitled to more than was allowed him by the account.

Laycock *vs.* Pickles, 4 Best & S. 497.

In this case Mr. Justice BLACKBURN thus states the rule (p. 506):

"The stating of the accounts itself was a sufficient consideration to support this action. * * * It is not necessary, in order to make out a real account stated that the debts should be debts *in presenti*, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had really been paid down on each side; and the balance is recoverable as if money had really been taken in satisfaction; subject to this, that where some of the items are such that if they had been actually paid, the party paying them would have been able to have recovered them back as on a failure of consideration, the account stated would be invalidated."

It cannot be contended that the claim for demurrage was not included in the settlement. It has been already shown that the validity of this claim was fully discussed at Rio Janeiro between the various parties. The facts were well known to them all. There can, therefore, be no ground for claim-

ing mistake under such circumstances. The account will not be opened.

Wilson *vs.* Frisbee, 57 Ga., 269.
Quinlan *vs.* Keiser, 66 Mo., 603.
Linville *vs.* State, 130 Ind., 210.

In the case cited by the Circuit Court of Appeals (Perkins *vs.* Hart, 11 Wheat., 237), the items sued for arose outside the contract, respecting which the settlement had been made. In the case at bar they are claimed under that contract.

Fifth.

The clauses in the charter party which have been construed by the Courts below are of constant occurrence in such instruments. The construction put upon them is, we believe, unjust and not in accordance with their fair interpretation or with the understanding of commercial men. The questions arising upon the record have never been determined by this Court. We ask that a *certiorari* may be granted in order that they may be deliberately heard and finally decided.

EVERETT P. WHEELER,
Advocate for Petitioners.